Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-43

TED BIRMINGHAM and wife,
MARTHA MAE BIRMINGHAM,
Petitioners,

vs.

FLOYD ALLISON and wife, VELMA ALLISON,
a Partnership Doing Business as Allison's Restaurant,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TENNESSEE

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I

QUESTIONS PRESENTED

The questions presented are: (a) Was the setting aside of jury verdict and the granting of a new trial by the trial judge, acting as the thirteenth juror, a "gross" abuse of

discretion and judicial power in view of the overwhelming and uncontradicted evidence and proof?

(b) Is the action of the trial judge detailed above reviewable by the appellate courts?

(c) Does the action of the trial judge, detailed above, amount in truth and fact to a denial of the Plaintiff's (Petitioners) right to trial by jury as secured by the Tennessee State Constitution Article 1, Section 6, and Article 6, Section 9, and as guaranteed by the Seventh Amendment of the Constitution of the United States?

II

STATEMENT OF THE CASE

Respondents are unable to accept the statement of the case as set out in the brief of Petitioners. Briefly stated, Petitioner Martha Mae Birmingham and her husband, Ted Birmingham, went to Allison's Restaurant in Greenfield, Tennessee, owned by Respondents, for dinner on the evening of October 24, 1972. It was a dark, rainy night. As they left the restaurant, Mrs. Birmingham fell on the pavement outside.

Petitioners allege in their complaint that Mrs. Birmingham tripped and fell by catching the heel of her shoe in a hole, located about twelve (12) feet from the front door, which was used as a cleanout drain capped with a metal plug. They alleged that the Allisons were guilty of negligence in allowing a dangerous condition to exist on the premises, and that Mrs. Birmingham's fall and resulting injuries were directly caused by such dangerous condition. The "hole" had existed on the restaurant property without incident for about fourteen (14) years.

Respondents' answer denied the allegation of negligence; alleged that the "hole" was only a trivial condition, and that Mrs. Birmingham knew of its existence and was guilty of proximate contributory negligence.

The first trial ended in a non-suit on Petitioners' motion made just before the jury was instructed by the Court.

A second complaint was filed alleging substantially the same acts of negligence, and the Allisons interposed substantially the same defenses. At the second trial, the jury returned a verdict for Mrs. Birmingham in the amount of Forty-Four Thousand Fifty & no/100 Dollars ($44,050.00), and for her husband in the amount of Two Thousand Seven Hundred Fifty-One & no/100 Dollars ($2,751.00).

Respondents' motion for a new trial was granted.

A motion to reconsider, filed by the Petitioners, accompanied by their sworn statements, informed the Court that they did not wish to retry the case, but requested only a reinstatement of the jury's verdict. Counsel for the Petitioners, with Mr. Birmingham present, stated in open Court that he thought it fitting that the Court dismiss the case for failure to prosecute as the same would not be retried. Whereupon, Respondents moved for dismissal for failure to prosecute and after taking the motion under consideration for three weeks, and the Court not having been advised otherwise by Petitioners' counsel, sustained the motion and dismissed the case for failure to prosecute.

By still another motion, Petitioners did request a new trial, but the Court overruled the same and granted an appeal. No assignment complained of this order.

A wayside bill of exceptions was timely filed by Petitioners but no other trial was ever had.

Petitioners contended in the Court of Appeals that the jury verdict should be reinstated since the action of the trial judge in granting a new trial as the thirteenth juror violated the constitutional mandate of a trial by jury.

The Court of Appeals of Tennessee, Western Section, at Jackson, dismissed the appeal (Pet. App. A-1-A-3).

By per curiam memorandum opinion, the Supreme Court of Tennessee denied the petition for writ of certiorari (Pet. App. A-4).

III

ARGUMENT

This case presents an anomoly. Petitioners allege a denial of constitutional rights to a jury trial after steadfastly refusing to follow Tennessee practice for appellate review to correct the errors of which they complain.

As the thirteen (13th) juror, the trial judge set aside the verdict of the jury and granted a new trial on three grounds: (1) Misconduct of the jury; (2) The verdict of the jury is contrary to the law and the evidence; and, (3) The verdict of the jury is contrary to the weight of the evidence. (Technical Record pp. 32, 33; See Appendix)

At common law there is no appellate review of an order granting a new trial. Since 1875, by statute, Section 27-108, *Tennessee Code Annotated*,[1] Tennessee appellate courts are required to review the trial judge's action in granting or denying a new trial. However,

1 "Erroneous ruling on new trial. It shall be lawful for the appellant to assign for error that the judge in the court below improperly granted or refused a new trial therein, and the appellate court shall have power to grant new trials, or to correct any errors in granting or refusing the same."

Tennessee has uniformly held that no appeal would lie until after final judgment. If the new trial is granted, the appealing party must preserve the record of the first trial by wayside bill of exceptions which is reviewable only after the judgment has become final in the successive trial. *Mize v. Skeen*, 63 Tenn. App. 37, 468 S.W. (2d) 733 (1971), and authorities cited therein.

It is the duty of the trial judge to set aside the verdict of the jury if for any reason he disapproves. After an adverse second trial, upon consideration of the wayside bill, first, the Court of Appeals or the Supreme Court of Tennessee could have corrected any of the errors, as alleged and complained of by Petitioners. See *Dykes v. Meighan Construction Co.*, 205 Tenn. 175, 326 S.W. (2d) 135, (1958).

Petitioners refused to retry the case and permitted the trial judge to enter an order of dismissal for failure to prosecute. Later, the trial judge overruled a subsequent motion for a new trial filed by Petitioners and granted an appeal. This did not address itself to the merits of the controversy, nor did it represent any change in the trial judge's disapproval of the jury verdict, but was the crutch used by Petitioners to reach the Court of Appeals in the first place. No error was assigned to the action of the trial court in dismissing the case, nor in overruling the last motion for a new trial. Petitioners only sought to have the Court of Appeals reinstate the jury verdict by circumventing long established Tennessee practice.

Petitioners seek relief here by asking this Honorable Court to overturn the rules of appellate practice existing in Tennessee for more than a century.

Petitioners were not denied a trial by jury. They refused every opportunity afforded for appellate review, and thereby closed the courthouse doors on this case. The questions they present are frivolous and unworthy of consideration.

CONCLUSION

The writ should be denied.

Respectfully submitted,

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Appendix

APPENDIX A

ORDER OF TRIAL COURT GRANTING THE MOTION FOR A NEW TRIAL (Technical Record pp. 32, 33)

IN THE CIRCUIT COURT OF WEAKLEY COUNTY, TENNESSEE

TED BIRMINGHAM AND WIFE MARTHA MAE BIRMINGHAM, PLAINTIFFS,	)	CIVIL ACTION NO. 4398
v.	)	
FLOYD ALLISON AND WIFE, VELMA ALLISON, a partnership, d/b/a ALLISON'S RESTAURANT, DEFENDANTS	)	

ORDER

This cause came on to be heard on this the 20th day of November, 1975, before the Honorable Phil B. Harris, Circuit Judge, on a Motion for a New Trial by the defend-

ants, Floyd Allison and wife, Velma Allison, the testimony of witnesses heard in open Court, argument of counsel and the entire record in the cause.

From all of which the Court finds that the motion should be sustained, because:

1. One, or more, members of the jury was guilty of misconduct in commenting on matters dehors the record, overheard by the Court, as the jury was retiring from the court room on one occasion during the trial, which, in the opinion of the Court, could have affected the results of the trial.

2. The verdict of the jury is contrary to the law and the evidence.

3. The verdict of the jury is contrary to the weight of the evidence.

IT IS THEREFORE ORDERED that the verdict herein, and the judgment entered thereon on the ___ day of August, 1975, be and they are hereby set aside and vacated, and a new trial is granted, the costs of the trial to abide the event of the action.

Plaintiffs moved to be allowed a direct appeal from the Court's ruling, which motion the Court overrules and disallows.

To all of which action of the Court, plaintiffs except and are allowed ninety (90) days within which to prepare and file a Wayside Bill of Exceptions.

Enter this 29th day of December, 1975.

/s/ Phil B. Harris
Circuit Judge